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IN THE

Supreme Court of the United States

October Term, 1975.

No. **75-372**

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Appellants,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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In the

Supreme Court of the United States

No. .....

Brian O'Donnell, Kalmon Yudkowsky, Ronald D'Elia, Roland Gozland, Patsy Barile, Joseph Fuchs, Robert Langelius, Leon J. Greenspan, Carl Bochterle, Ezra Berkowitz, Jeffrey Silverbush, Louis Ehrenkranz, Martin Tanenbaum,

Appellants,

against

Arthur A. Antin and White Plains Board of Education,

Appellees.

On Appeal From the Court of Appeals of the State of New York.

Jurisdictional Statement.

Appellants appeal from the judgment of the Court of Appeals of the State of New York, entered on the 12th day of June, 1975, affirming a judgment in favor of the appellees entered on the 17th day of June, 1974, rendered by the Honorable John C. Marbach, Justice of the Supreme Court, State of New York, County of Westchester, wherein it was ordered, adjudged and decreed that §3635 of the New York State Education Law is constitutional as written, applies to appellants, does not deny appellants the equal protection of the laws, and that the action of the

appellee Board of Education denying the appellants transportation is a lawful and proper effectuation of the resolution of the appellee Board of Education, dated May 4, 1973.

Opinions Below.

The decision of the New York State Court of Appeals, dated June 12, 1975, and affirming the judgment of the Supreme Court of the State of New York, is attached as part of the appendix to the statement and is not yet reported.

The opinion of the Honorable John C. Marbach, dated May 16, 1974, in favor of the appellees, is attached as part of the appendix to this statement and is reported at 81 Misc. 2d 849.

The opinion of the Appellate Division, Second Department, dated September 14, 1973, granting to appellants a plenary trial on the merits is attached as a part of the appendix to this statement and is reported at 43 A. D. 2d 699 (2nd Dept., Case 11).

The opinion of the Honorable W. Vincent Grady, dated June 28, 1973, denying appellants' application for preliminary injunction and determining the constitutionality of the statute is attached as a part of the appendix to this statement and is not reported.

Jurisdiction.

This suit was brought for declaratory judgment pursuant to CPLR 3001 and for injunctive relief claiming that §3635 of the Education Law of the State of New York deprived

appellants of the equal protection of the law insofar as it denied them transportation for their children to and from school as residents of a city school district. The judgment of the Court of Appeals of the State of New York was entered on the 12th day of June, 1975, affirming a judgment in favor of the appellees entered on the 17th day of June, 1974. Notice of appeal was filed in the Court of Appeals of the State of New York on August 15, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Broad River Power Co. v. State of South Carolina,* 281 U. S. 537 (1930); *James Stewart & Co., Inc., v. Sadrakula,* 309 U. S. 94 (1940); *People of the State of Illinois v. Board of Education,* 333 U. S. 203 (1948); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Churches in North America,* 344 U. S. 94 (1952); *Marcus v. Search Warrants of Property, etc.,* 367 U. S. 717 (1961); *Lathrop v. Donohue,* 367 U. S. 820 (1961); *Schroeder v. City of New York,* 371 U. S. 208 (1962); *Bantam Books, Inc., v. Sullivan,* 372 U. S. 58 (1963); *Robinson v. State of Florida,* 378 U. S. 153 (1963); *WHYY, Inc., v. Borough of Glassboro,* 393 U. S. 117 (1968).

The Statute Involved.

The statute involved is §3635(1) as amended by the laws of 1974, Chapter 755, §1. This statute may be found at Book 16, McKinney's Consolidated Laws of New York Annotated, Cumulative Annual Pocket Part for use in 1974-1975 at page 159. The text of the statute as amended is set forth verbatim as a part of the appendix to this statement.

Question Presented.

Whether §3635 of the Education Law of the State of New York deprives appellants of their right to equal protection of the law in that it arbitrarily, capriciously, unreasonably and irrationally discriminates between residents of *all city* school districts as a class and residents of *all non-city* school districts as a class, by mandating transportation for *all* school children—public, private and parochial, residing in *all* non-city school districts, while merely allowing *any* city school district to provide any transportation at its option, although many city school districts serve students who live both inside and outside the municipal boundaries of the city, and many non-city school districts serve residents who live both inside and outside the municipal boundaries of such cities as are contained within the non-city school districts.

Statement of Facts.

The appellants, residents of the City of White Plains, and of its school district, are parents of children who attend parochial schools located outside the White Plains city limits. Some of the children attend Westchester Day School in Mamaroneck (an Orthodox Jewish parochial school) and others attend St. Anthony's in Harrison (a Catholic parochial school). Although all appellants live at least 1.5 but less than 15 miles from the nearest available parochial school which their children attend, they are denied free bus transportation for their children solely because their children attend parochial schools outside the city limits of White Plains. Consequently, they have been forced to either remove their children from parochial school or incur additional expenses in carfare or private busing;

thus infringing on their religious preferences by making it economically more difficult for them to send their children to parochial school.

Since 1964 the City of White Plains had provided a limited amount of free busing for public, private and parochial school students. The city had routinely provided free bus transportation for students from kindergarten through sixth grade to and from all public, private and parochial schools so long as the schools were located at least 1.5 miles but no more than 10 miles from the residence of the children, regardless of whether or not such schools were located within the territorial limits of the City of White Plains. Motivated by a desire to cut back in the education budget to save $50,000, the White Plains Board of Education passed a resolution on May 14, 1973, eliminating free bus transportation for all non-public school students desiring to attend any schools *outside* the city limits.

The trial court found as a fact that:

> public transit facilities in and around White Plains are not geared to the needs of students for school busing. The testimony of individual plaintiffs [appellants] established the danger and futility of their young children having to depend on public transportation to reach St. Anthony's and the Westchester Day School.

The availability of public transportation that students could use in the City of New York (which includes a substantial subway network as well as pervasive bus routes, the scheduling of which is based on actual studies of public needs and school schedules) is contrasted with that of Westchester County by the testimony of Westchester Com-

missioner of Transit, Leary. She stated that school schedules are not considered when bus schedules are drawn up. The testimony of Superintendent of Schools Antin corroborated that there is no coordination between the White Plains Board of Education and the bus companies.

How Federal Questions Raised.

The claim that §3635 of the Education Law of the State of New York was repugnant to the federal constitution was first raised by appellants in their complaint (paragraph 18). It was argued before the lower court on the application for a preliminary injunction and was so recognized by the court in denying the application in its opinion dated June 28, 1973. It was once again argued to the Appellate Division of the Supreme Court on appeal from denial of the injunction and was recognized by that court in granting a plenary trial upon appellants' claim of a denial of their right to equal protection of the laws in the opinion dated September 14, 1973. The claim was again asserted to the trial court and, as such was recognized by the trial court in granting judgment for the appellees on June 17, 1974, based upon the court's opinion dated May 16, 1974. The claim was once again asserted by appellants before the Court of Appeals of the State of New York and, as such, was recognized by the Attorney General of the State of New York in moving for leave to intervene on behalf of the constitutionality of the statute by motion dated July 17, 1974. The claim was further recognized by the Court of Appeals of the State of New York by its decision and order dated June 12, 1975, adopting the opinion of the trial court below and affirming the judgment upholding the validity of the statute.

It is the position of the appellants that Education Law §3635 is unconstitutional as a suspect categorization, in that it creates an arbitrary, unreasonable, capricious and irrational distinction between city and non-city school districts regarding their respective obligations to bus students, without rational or logical basis, and is thus repugnant to our Federal Constitution as a denial of equal protection under the law.

An examination of basic data on Westchester County reveals that the boundary lines of city school districts within the County of Westchester do not coincide with the municipal boundary lines for those cities. The White Plains City School District line overlaps into the Towns of Harrison and North Castle. In New Rochelle, the city school district line overlaps into the Town of Eastchester. The school district lines of the cities of Yonkers and Mt. Vernon overlap into each other. The Yonkers district overlaps into the Town of Eastchester and the Village of Bronxville.

The Rye City School District includes Rye City, while Rye Neck, a non-city school district, includes Rye Town as well as Rye City. Similarly, the City of Peekskill, is covered by the Peekskill City School District and by the Cortlandt Central School District which also covers the Town of Cortlandt.

This phenomena is not only prevalent in Westchester County, but extends throughout the entire State of New York. The "Directory of New York State Public Schools and Administrators, 1974-1975," published by the University of the State of New York, The State Education Department, reveals that many of the *non-city* school districts

include within their boundaries areas located within the municipal boundaries of adjacent cities. Thus, Broome County, Chenango Forks Central School District includes part of Binghamton. The same applies to the Susquehanna Valley Central School District. In Chautauqua County the following two school districts include the City of Jamestown—Bemis Point Central School District and Southwestern Central School District. In Dutchess County, Arlington Central School District and Wappingers Falls Central School District include a portion of the City of Poughkeepsie. In Erie County Cheektowaga Central School District, Cheektowaga-Sloane Union Free School District and West Seneca Central School District all include portions of the City of Buffalo. Kenmore Public School District includes portion of the City of Tonowanda. In Monroe County, Churchville Chili Central School District includes a portion of the City of Rochester. In Niagara County, New Fame Central School District includes a portion of the City of Lockport. In Orange County, Washingtonville Central School District includes a portion of the City of Newburgh. In Rennselaer County Britton Kill Central School District and Wymanskill Common School District both include portions of the City of Troy.

The following city school districts include adjoining townships or villages. The first is the Chemung County Elmira Public School District, which includes Pine City and Wellsburg. In Columbia County, the Hudson Public School District includes Claverack and Stottville. In Orange County, Newburgh Public School District includes Vailsgate, while in the County of Saratoga, Saratoga Springs Public School District includes Greenfield Center.

Most significantly, the City of Sherrill School District includes the adjoining towns of Vernon and Verona, and no school building is located within the Sherrill city limits.

The statute neither considers nor provides transportation for school districts based upon population density or geographical size. The New York manual reveals that there exist 48 cities which have a lesser population than that of White Plains. City populations vary from as little as 2,986 (Sherrill in Oneida County) to as much as 7,895,563 (New York City).

An examination of a listing of all of the towns within the State of New York reveals that 393 towns have a population greater than that of the smallest New York city, Sherrill in Oneida County, and that 17 towns have a population greater than that of the City of White Plains.

An examination of a listing of all of the incorporated villages within the State of New York reveals that 156 villages have a population greater than that of Sherrill, while a listing of all the unincorporated communities within the State of New York reveals that 155 such communities have a population greater than that of Sherrill.

In sum, pursuant to §2625 of the Education Law, the school districts encompassing Sherrill in Oneida County, with a population of 2,986, and all other city school districts have no obligation to provide transportation for their residents, whether within or without the municipal city limits, while all non-city school districts serving 393 towns, 156 villages and 155 unincorporated communities (including those school districts with parts of cities encompassed therein), and all having populations greater

than that of Sherrill, are obligated to provide transportation. It is obvious that there is no rhyme or reason to a statute exempting school districts with a lesser population from the obligation to provide transportation, because they are labelled city school districts, but obligating school districts with a greater population to provide transportation because they are labelled non-city school districts, both classes have encompassed therein parts of "cities," towns, villages and unincorporated areas.

The Federal Questions Are Substantial.

Appellants submit that the questions raised below and submitted to this court are substantial. The State of New York, with a population approaching seventeen million people, irrationally discriminates against all school children resident in "city school districts," without showing a reasonable basis therefor, and without serving any legitimate state purpose, compelling or otherwise. In determining which students shall receive free transportation to and from their schools, and which shall not, the Legislature has created a "suspect" category. No city school district in the State of New York provides the full measure of bus transportation mandated by §3635 of the Education Law to be provided to all school children residing in all non-city school districts. The statute fosters an invidious discrimination against all school children—public, private and parochial—residing in all city school districts as a class.

The financial burden placed upon the parents of children—because of the accident of their residence in a city school district rather than in a non-city school district—to pay for transportation is enormous. In White Plains alone, the Board of Education claimed to be saving $50,000

by depriving appellants and others of transportation heretofore provided. The proof at the trial showed that the average cost of transportation per pupil was $600 per year. When you consider that the City was only providing transportation for children up to the 6th grade, and providing no transportation for children from the 7th through 12th grades, the class of those deprived of transportation multiplies in direct proportion. There are at least two to three million school children in the State of New York who are being similarly deprived. It is elementary that a proper determination by this court—that §3635 of the Education Law of the State of New York is repugnant to the Federal Constitution—will not only alleviate the financial hardships imposed upon the parents of *all* children resident in *all* city school districts in the State of New York—public, private and parochial—but that it will have a similar effect of alleviating the financial hardships imposed upon all other students in all other city school districts throughout the United States who are similarly deprived by virtue of similar state statutes. Cf. *Cartwright v. Sharpe,* 40 Wisc. 2d 494, 162 N. W. 2d 5 (1966), construing §121.54 *et seq.* of the Wisconsin Statutes. Also see, *Morrissette v. DeZonia,* 63 Wisc. 2d 429, 217 N. W. 2d 377, 381 (1974).

Appellants ask this court to find that §3635 of the Education Law has unconstitutionally denied equal treatment to school children who reside in city school districts in the State of New York on the sole ground that they reside in such school districts in the same manner as it found that New Jersey had unconstitutionally denied equal treatment to non-profit corporations owning property in that state on the sole ground that such corporations had not been incorporated in New Jersey. *WHYY, Inc., v. Borough of Glassboro,* 393 U. S. 117 (1968).

Argument.

The Legislature of the State of New York has created several different classes of school districts. In its wisdom, the Legislature has classified school districts as to size and complexity, and with different rules applicable to each with regard to items such as fiscal responsibility, electrions, governing bodies, powers, etc. (Insofar as transportation is concerned, all are classified either "non-city" or "city.") All of these various classifications have some reasonable basis in fact or logical explanation for the classification, *except where transportation is concerned.*

It is only with regard to transportation that the legislative classification into *city* school districts as opposed to *non-city* school districts becomes suspect and unconstitutional as irrational, illogical, and thus unreasonable, arbitrary and capricious, serving no legitimate state purpose, compelling or otherwise.

The appellees have so far successfully argued that the distinction between city and non-city school districts with regard to transportation is reasonable, rational and logical, because public transportation is readily available in city school districts, but is not readily available in rural school districts. This court should note that *nowhere* is such a rationale found in the statute itself, its legislative history, as an established fact, or even as a widely accepted misconception.

The statute states that transportation is to be provided to those students who are in need of such transportation because of the *remoteness of the school to the child or for the promotion of the best interests of such children.* No

mention is made as to the availability of public transportation or the lack of it. The rationale is thus: remoteness of the school to the child, or the promotion of the best interests of such children. Distance is distance, whether in New York City or in the wilds of Franklin County. It cannot be rationally argued that it promotes the best interests of children to walk a given distance in a teeming urban metropolis, rather than in a remote bucolic rural setting—or that it is safer to travel on crowded city streets rather than on uncrowded country lanes! Transportation is either in the best interests of children, without regard to the political characterization of their abode or it is not.

The language of the statute exempting city school districts from mandatory transportation makes no mention of why the exemption is provided, but merely provides the exemption. We are thus faced with the thoroughly irrational, illogical and ridiculous situation of transportation being granted or withheld, based not upon any logical criteria, but upon the accident of residence in a non-city school district or a city school district. Since each serves both non-city and city municipalities, availability of transportation is an illusory premise.

If the argument of the appellees be accepted that the availability of public transportation in cities is the rational basis for the denial of transportation for city school district residents, how then can you explain students resident within the municipal limits of cities such as Peekskill, Rye, Sherill, Rochester, etc., getting free busing if their portion of the city is also within the confines of a non-city school district, while other residents of those same cities who reside within the boundaries

of the city school district will not. The converse situation prevails for residents of non-city municipalities covered by school districts which include within their boundaries parts of cities as well as parts of towns, villages or unincorporated areas. Can it rationally be said that there is available adequate public transportation only in those parts of cities which are serviced by a so-called city school district, but that such public transportation is inadequate or unavilable in those parts of cities which are covered or serviced by non-city school districts! The classifications are per se unconstitutional.

It is black letter law that unreasonable classification violates the equality clause of the 14th Amendment. 16 Am. Jur. 2d Constitutional Law, §§ 494, 496, 498-500 and 511. 16A C.J.S. Constitutional Law, §§ 502 *et seq.;* 9 N. Y. Jur. Constitutional Law, §§ 286 *et seq.* It therefore follows that the Legislature cannot arbitrarily create a class and make it binding on the courts without disclosure of its rational basis. Discrimination cannot stand as reasonable if it offends the plain standards of common sense. *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U. S. 459 (1937).

In the above case the Supreme Court of the United States struck down a Georgia statute which discriminated between salaried employees of a stock insurance company and those of a mutual insurance company with regard to license as a resident agent. The court found that the discrimination offended plain standards of common sense, and could not stand as reasonable. Cf. *WHYY, Inc., v. Borough of Glassboro,* 393 U. S. 117 (1968); *Colgate v. Harvey,* 296 U. S. 404 (1935); *Blake v. McClung,* 176 U. S. 59 (1900).

A similar result was achieved in *Bordens Farm Products Co. v. Baldwin,* 293 U. S. 194 (1934). Here the Supreme Court struck down a *New York statute* which had the absurd result of establishing for the respective dealers different minimum prices for the same grade of milk bought and sold at the same time and place in and under the precisely same conditions aside from the use of a well advertised trade name. The Supreme Court found that such a statute was clearly unreasonable on its face. Similarly, the Supreme Court struck down the distinction between legitimate and illegitimate children in authorizing wrongful death suits under the Louisiana statute in *Levy v. Louisiana,* 391 U. S. 68 (1968). The Supreme Court also failed to see the rationale of the discrimination between classes of legitimate children based upon whether they were acknowledged or unacknowledged, and thus struck down a Louisiana statute denying workmen's compensation claims of dependent unacknowledged illegitimate children. *Weber v. Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972). Also see *Jiminez v. Weinberger,* 417 U. S. 628 (1974).

The court found invidious the discrimination practiced by the State of Texas upon members of the Armed Forces who became domiciliaries of Texas, but were refused a right to vote so long as they were in the service in *Carrington v. Rash,* 380 U. S. 89 (1965). While in *Frontiero v. Richardson,* 411 U. S. 677 (1973), the Supreme Court found unconstitutional federal statutes that discriminated against *service women* with regard to claiming husbands as dependents without any showing of actual dependence for support, while not requiring a similar showing of *servicemen.* Cf. *Reed v. Reed,* 404 U. S. 71 (1971), and *Weinberger v. Wiesenfeld,* U. S. , 95 S. Ct. 1225 (1975). Also see *Taylor v. Louisiana,*

U. S. 42 L. Ed. 2d 690 (1975), holding that women as a class could not be excluded or given automatic exemptions based wholly on sex from service on juries.

The Supreme Court refused to draw the line between "petty" and "serious" to coincide with the line between *misdemeanor* and *felony* when it struck down a *New York statute* denying jury trials in certain criminal cases—misdemeanors punishable by imprisonment up to one year. *Baldwin v. New York,* 399 U. S. 66 (1970).

While classifying school districts to determine transportation may be a legitimate legislative concern, this statute does not bear a rational relationship to a legitimate purpose. Cf. *Memorial Hospital v. Maricopa County,* 415 U. S. 250 (1974). Merely designating a school district as city or non-city, where each may encompass in whole or in part an actual city as well as adjoining towns, villages or unincorporated areas, does not assure the adequacy or availability of public transportation therein, or the lack of it.

Obviously, school districts labeled city or non-city bear no relation to the availability of transportation, its adequacy or the lack of it. Such categorization is irrational and illogical, having no relation to geographical size, population density or any conceivable criteria equatable with the availability of adequate public transportation. Cf. *Moore v. Ogilvie,* 394 U. S. 814 (1969).

It has been held that one of the most sensible tests of the validity of a classification of a statute is whether any substantial favor is gained by one class or any greater burden is fastened on the other by reason of the classification. *Youngstown Sheet & Tube Co. v. City of Youngstown,* 91 Ohio App. 431, 108 N. E. 2d 571, as cited in 16a C. J. S. Constitutional Law §505, page 317. §3635 of the Education Law of the State of New York cannot pass this sensible test. Also see *Reynolds v. Sims,* 377 U. S. 533 (1964), and all other cases in which the Supreme Court struck down legislative apportionment under the equal protection clause as not being on a population basis and completely lacking in rationality.

In an earlier case, *Gast Realty & Investment Co., v. Schneider,* 240 U. S. 55 (1916), the court struck down a municipal ordinance of the City of St. Louis creating a taxing district encompassed by an irrational boundary line. The court found the ordinance to be bad on its face as distributing a local tax in grossly unequal proportions.

In *Kramer v. Union Free School District,* 395 U. S. 621 (1969), the Supreme Court struck down as unconstitutional §2012 of the *New York State Education Law* on the grounds that it denied equal protection of the law by limiting the franchise in certain school districts to owners or lessees of taxable realty or their spouses and parents or guardians of children in public schools. In so doing, the Supreme Court rejected the argument that such a limit of the franchise was necessary to promote a compelling state interest—that of limiting the franchise to those primarily interested in elections—and excluding all others. Cf. *Lubin v. Panish,* 415 U. S. 709 (1974).

Another *New York statute* was struck down by the Supreme Court of the United States in *O'Brien v. Skinner,* 414 U. S. 524 (1974), where the court held that New York's Election Law insofar as it denied persons detained

in counties of their residence, absentee registration or voting while granting these rights to persons similarly detained outside counties of their residence was a denial of equal protection. Cf. *Dunn v. Blaumstein,* 405 U. S. 330 (1972).

In *Erznoznik v. City of Jacksonville,* U. S. 95 S. Ct. 2268 (1975), an ordinance of the City of Jacksonville was held invalid on its face as an unlawful discrimination among movies solely on the basis of content in that it prohibited the showing of films containing nudity by a drive-in theater when its screen was visible from a public street or place. While in *James v. Strange,* 407 U. S. 128 (1972), the Supreme Court affirmed a decsion of a three-judge court striking down a Kansas recoupment statute that did not allow indigent defendants all of the exemptions provided for other judgment-debtors on the grounds that the state had singled out indigent defendant judgment-debtors for discriminatory treatment for no rational reason and had imposed on them punitive conditions of repayment not imposed upon other judgment-debtors. The court found that such a statute was a denial of equal protection of the law.

In *Rinaldi v. Yaeger,* 384 U. S. 305 (1966), the Supreme Court struck down a New Jersey statute which discriminated between prisoners on the one hand and those fined, given suspended sentences or placed on probation on the other with regard to payment by indigents for the trial transcript on appeal.

In *Eisenstadt v. Baird,* 405 U. S. 438 (1972), the Supreme Court held that a Massachusetts statute that permitted married persons to obtain contraceptives to prevent pregnancy but prohibited distribution to single persons for that purpose violated equal protection of the law.

The court stated that the statutory classification distinguishing between married and unmarried with regard to contraceptives was unreasonable and had no fair or substantial relation to the object of the legislation.

By authorizing transportation of school children the Legislature has determined that it is in the best interests of such children. The rationale behind that determination is the remoteness of the school to the child. In so doing, the Legislature has placed reasonable parameters around such transportation—between two and 15 miles. If the Legislature had ended its endeavors at this point, no fault could be found, since all children, public, private or parochial, between kindergarten and twelfth grade, would be entitled to transportation within the reasonable limits prescribed. It is only when the Legislature set out to exclude certain school children from the benefits of such transportation—by imposing the mandate to provide transportation only on non-city school districts—do we run afoul of the 14th Amendment.

As demonstrated hereinabove, the Supreme Court has struck down with impartial consistency the statutes of New York State, as well as the statutes and ordinances of its sister states and their political subdivisions; where these statutes bore no rational basis in fact, served no legitimate state purpose, compelling or otherwise; were illogical and irrationally conceived, and invidiously discriminated by arbitrary classification; granting benefits on the one hand, and imposing detriments on the other, without rhyme or reason at the whim or fancy of the Legislature.

Such is §3635 of the Education Law of the State of New York. So should it be treated by this August court.

It is without rhyme or reason; serves no legitimate state interest or purpose, compelling or otherwise; invidiously discriminates against residents of city school districts without any rational or logical basis in fact or fancy, real or imagined!

It is respectfully submitted that the Court of Appeals of the State of New York, by its decision here on appeal, has failed to recognize the invalidity of this statute, and so has deprived nearly three million school children—public, private and parochial—and their parents, resident in city school districts, of the equal protection of the laws. The question presented by this appeal are substantial and of compelling public importance.

Dated: While Plains, New York,
August 29, 1975.

Respectfully submitted,

LEON J. GREENSPAN,
Counsel for Appellants,
Greenspan and Aurnou,
14 Mamaroneck Avenue,
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APPENDIX.

Decision and Order of the Court of Appeals of the State of New York, Entered June 12, 1975.

Sup. Ct. No. 236

BRIAN O'DONNELL, *et al.*,
Appellants,

vs.

ARTHUR ANTIN, *et al.*,
Respondents.

Judgment affirmed, without costs, on the reasoning contained in the opinion by Mr. Justice John C. Marbach at Special Term except that it is not necessary for the Court in this case to reach the question of the right of private and parochial schools to participate in public benefits. All concur.

Judgment of the Supreme Court of the State of New York by the Honorable John C. Marbach, Entered June 17, 1974.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

BRIAN O'DONNELL, KALMON YUDOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Plaintiffs,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Defendants.

Index No.: 6620/73

The issues in the above entitled action having duly come on for trial before Mr. Justice John C. Marbach at Special Term Part III, of this Court held at the Courthouse thereof, located at 166 Main Street, White Plains, New York on the 6th day of March, 1974 and the Plaintiffs above named having appeared by their attorneys, Greenspan and Aurnou, Esqs., and the Defendants Arthur A. Antin and White Plains Board of Education having appeared by their attorneys, Smith, Ranscht, Pollock, Barnes, Manos & Connors, Esqs., and the issues having been duly tried and decision was reserved to allow the Attorney General of the State of New York to file a Memorandum of Law and the Court having rendered its decision in writing on May 16th, 1974 in favor of the Defendants,

Now, on motion of Smith, Ranscht, Pollock, Barnes, Manos & Connors, Esqs., attorneys for the Defendants, it is

ORDERED, ADJUDGED AND DECREED as follows:

FIRST: That the Defendants are providing transportation equally to all children in like circumstances pursuant to the New York State Education Law, Section 3635.

SECOND: That Section 3635 of the New York State Education Law is constitutional.

THIRD: That the Plaintiffs have failed to demonstrate that Section 3635 of the New York State Education Law denies them equal protection of the laws.

FOURTH: That the resolution of the Defendant, Board of Education, dated May 14th, 1973 and the actions of the Defendant in effectuating the resolution are lawful and proper and that Section 3635 of the New York State Education Law is constitutional as written and as it applies to the Plaintiffs.

FIFTH: The court in its discretion does not allow costs.

Enter,

s/ JOHN C. MARBACH
J. S. C.

Opinion of the Honorable John C. Marbach, Dated May 16, 1974.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

BRIAN O'DONNELL, KALMON YUDOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Plaintiffs,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Defendants.

Index #6620/73

MARBACH, J.:

On May 14, 1973, defendant White Plains Board of Education adopted a resolution eliminating transportation of private and parochial school students to schools outside the boundaries of the school district. Shortly thereafter, plaintiffs, who are parents of parochial school students no longer to be bussed under the resolution, brought this action for declaratory and injunctive relief to prevent the implementation of the resolution. On June 20, 1973, Mr. Justice Grady of this court denied plaintiffs' application for a preliminary injunction and declared the resolution of defendant Board to be, in all respects, lawful. On appeal to the Appellate Division, that court affirmed the denial of the preliminary injunction but remanded the case to this court for trial on plaintiffs'

claim of a denial of their right to equal protection of the laws. Trial was held in this court on March 6, 1974, and decision was reserved to allow the Attorney General of the State of New York to file a memorandum of law.

Plaintiffs are all residents of the City of White Plains and live within the confines of the White Plains City School District. Their children attend either St. Anthony's school in the Town of Harrison (Roman-Catholic affiliation) or the Westchester Day School in the Town of Mamaroneck (Orthodox-Jewish affiliation). Both schools are located outside of the White Plains School District and both are between 1.5 and 10 miles from the residences of the respective plaintiffs. Prior to September, 1973, when the May 14, 1973, resolution took effect, defendant School Board had provided transportation for all children who lived between 1.5 and 10 miles from the school they attended, regardless of whether the school was located within or without the district. The effect of the Board's resolution was to deprive plaintiffs' children of free bus transportation which they had previously enjoyed for some years. Proof at trial established that there is no other school of Orthodox-Jewish affiliation within the district and that the Roman-Catholic schools in the district are filled to capacity and thus unable to enroll the children of the St. Anthony's plaintiffs. Thus, while defendant Board continues to bus all children to all schools within the district, regardless of affiliation, plaintiffs have been forced to seek alternative means of transportation.

It must be noted that the record establishes that the action of the Board was motivated by budgetary considerations and there is no evidence whatsoever that the Board intended to infringe in a suspect manner on the rights of these plaintiffs, their schools or their respective religious affiliations.

Plaintiffs contend that the statutory provision regarding transportation of pupils requires defendants to continue to bus their children. The controlling statute is section 3635 of the Education Law which in pertinent part reads as follows:

> "Sec. 3635. Transportation.—Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of ten miles, the distances in each case being measured by the nearest available route from home to school . . . .The foregoing provisions of this subdivision shall not require transportation to be provided for children residing within a city school district, but if provided by such district pursuant to other provisions of this chapter, such *transportation shall be offered equally to all such children in like circumstances.* Nothing contained in this subdivision, however, shall be deemed to require a school district (i) to furnish transportation to a child directly to or from his home, or (ii) in the case of a child attending a parochial school of his denomination, to furnish transportation except to or from the nearest available parochial school of such denomination." [Italics added].

Defendants rely on the same statutory language to uphold their position. The parties differ on the interpretation of what constitutes "like circumstances" in regard to transportation provided by city school districts. Plaintiffs claim that since their children live within 1.5 to 10 miles of the schools they attend (the mileage limits within which defendant Board provides bussing) they are in like circumstances to the children who attend school within the district. Defendants on the other hand claim that students attending school outside the district are not in like circumstances to students going to school in the district and that since they bus all children within the district and uniformly deny bussing to children going out of the district, they are complying with the statutory language. Plaintiffs reject the within-district/without district dichotomy as a basis for interpreting what is "like circumstances".

A review of the authorities cited by the parties indicates that defendants have complied with the requirements of section 3635. The Commissioner of Education has ruled that pupils attending school outside the district are not in like circumstances to those attending school within the district and has upheld the actions of city school boards in denying transportation to the former group while providing it for the latter. *Matter of Kopser,* 10 Ed. Dept. Rep. 238; *Matter of Yankowitz,* 7 Ed. Dept. Rep. 44. These rulings are in accord with judicial interpretation of what constitutes "like circumstances" within the meaning of the statute. *Brown v. Allen,* 23 A. D. 2d 591; *Sands Point Academy v. Bd. of Education,* 63 Misc.

2d 276. Rulings of the Commissioner and cases relied on by plaintiffs, especially *Martin v. Brienger,* 49 Misc. 2d 130, are not inconsistent with the authorities cited above nor are they controlling for they deal with bussing by non-city school districts which is mandated by statute and not, as in this case, with the optional providing of transportation by a city school district. On the record before the court, it appears that defendants are providing transportation equally to all children in like circumstances pursuant to the stationary scheme and this court so holds.

The holding above does not end the inquiry, however, since plaintiffs attack the statutory scheme of section 3635 on constitutional bases. Plaintiffs contend that insofar as section 3635 makes transportation mandatory in non-city school districts and only optional in city school districts, it creates an arbitrary distinction and deprives residents of city school districts of equal protection of the laws. They further contend that as applied to them in this case, the statute infringes on their free exercise of religion.

A state statute is presumed to be constitutional and so long as the classification it creates has a reasonable basis and serves a legitimate state purpose, it will pass muster under the equal protection clause. If the statute does not create "suspect" categories or irrationally or individually discriminate against a particular class of persons, it may not be deemed unconstitutional. *McGowan v. Maryland,* 366 U. S. 420; *Dandridge v. Williams,* 397 U. S. 471. A reading of section 3635 indicates that the distinction between city and non-city school districts rests on a legislative determination that rural and suburban areas do not have transportation facilities equal to those of urban areas. Plaintiffs attack this rationale as arbitrary and

without merit. At trial, plaintiffs produced proof that public transit facilities in and around White Plains are not geared to the needs of students and are wholly inadequate as a substitute for school bussing. The testimony of individual plaintiffs established the danger and futility of their young children having to depend on public transportation to reach St. Anthony's and the Westchester Day School. While this proof may demonstrate a case for legislative and political remedial action, it does not suffice to overcome the presumption of the statute's validity. There has been no showing that on a statewide basis, the legislative distinction is invalid or irrational. There is no requirement in the law that all school districts, as school districts, be treated alike and the fact that the operation of the statute results in some inequities does not make it violative of the equal protection clause. *San Antonio School District v. Rodriguez,* 411 U. S. 1. On the record before the court, plaintiffs have not overcome the presumed constitutionality of section 3635 and have failed to demonstrate that the statute denies them equal protection of the laws.

Plaintiffs state correctly that if a law infringes on the free exercise of religion, only a compelling state interest may uphold the law's validity. The burden is on the state to demonstrate the compelling interest and there is no presumption of validity to be overcome by those attacking the law as in the ordinary equal protection case. *Wisconsin v. Yoder,* 406 U. S. 205. Plaintiffs seek to apply this standard to the present case, claiming that even if the statute, and the actions of defendants pursuant thereto, serve some colorable state purpose, this purpose does not amount to a compelling state interest sufficient to justify the claimed infringement on their religious freedom. While plaintiffs' right to educate

their children in secular school cannot be disputed, they do not claim that such secular education is required as a matter of their respective religious faiths. Nothing in section 3635 of the Education Law, or in defendants' actions taken pursuant to the statute, compels plaintiffs to educate their children in public schools or to perform any acts undeniably in conflict with tenets of their faiths as was the case in *Wisconsin v. Yoder, supra,* or *Sherber v. Verner,* 374 U. S. 398, cases relied on by plaintiffs. The most that plaintiffs have established is that the resolution of defendant Board has made it inconvenient to send their children to parochial schools outside the district and that they have had to incur some financial burden in order to do so. If denial of transportation to parochial school children, pursuant to an otherwise valid legislative scheme, is an unconstitutional infringement of religious freedom, then such transportation must be deemed to be constitutionally mandated. This court is aware of no such rule of law. Private and parochial schools have no right to share in state largesse on an equal basis with public schools or otherwise (*Norwood v. Harris,* 93 Sup. Ct. 2804), and while a state may use state funds to provide transportation to parochial schools, it need not do so. *Everson v. Bd. of Education,* 330 U. S. 1; *Wenner v. Bd. of Education,* 71 Misc. 2d 978. In conclusion, this court finds that there has been no undue burden placed on plaintiffs' free exercise of religion and the reasoning and result of *Wisconsin v. Yoder, supra,* and similar cases cited by plaintiffs, is inapplicable to the case at bar.

Accordingly, it is the decision of this court that the resolution of the defendant Board of Education dated May 14, 1973, and the actions of the defendants in effectuating the resolution were lawful and proper and that section 3635 of the Education Law is constitutional as written and as it applies to plaintiffs.

Submit judgment on notice.

Dated: White Plains, N. Y.
May 16, 1974

/s/ JOHN C. MARBACH
J. S. C.

Greenspan & Aurnou, Esqs.
Attorneys for Plaintiffs
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White Plains, N. Y. 10601

Smith, Ranscht, Pollock, Barnes, Manos & Connors, Esqs.
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56 Grand Street
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Opinion of the Appellate Division, Second Department, Dated September 14, 1973.

..... A. D. 2d ..... A—September 14, 1973.

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BRIAN O'DONNELL, *et al.*,

Appellants,

v.

ARTHUR A. ANTIN, *et al.*,

Respondents.

In an action for declaratory and injunctive relief, plaintiffs appeal from an order and judgment (one paper) of the Supreme Court, Westchester County, dated July 23, 1973, which denied their motion for a preliminary injunction and, without a trial, declared the rights of the parties.

Order and judgment modified by striking therefrom all the decretal provisions other than that which denied plaintiffs' motion for a preliminary injunction. As so modified, order and judgment affirmed, with $20 costs and disbursements.

In our opinion, before the rights of the parties may be declared, a trial must be held upon plaintiffs' claim of a denial of their right to equal protection of the laws.

Hopkins, Acting P. J., Latham, Shapiro, Gulotta and Benjamin, JJ., concur.

December 3, 1973.

Opinion of the Honorable W. Vincent Grady, Dated June 28, 1973.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

BRIAN O'DONNELL, *et al.*,

Plaintiffs,

against

ARTHUR A. ANTIN, *et ano.*,

Defendants.

Index No. 6620/73

Motion Date—June 6, 1973

Motion Cal. #7

GRADY, J.:

Plaintiffs are the parents of children who are attending either St. Anthony's parochial school located in Harrison, New York, or Westchester Day School located in Mamaroneck, New York. The plaintiffs are residents of the City of White Plains and they have applied for transportation to be furnished their respective children for the school year commencing September 1973. This is an application for a preliminary injunction to prohibit the dedefendants from interfering with, depriving or refusing to provide transportation for plaintiffs' children to and from St. Anthony's parochial school or Westchester Day School and mandating the defendants to furnish transportation to and from said schools.

Defendant Board of Education passed a resolution on or about May 14, 1973, which provided that for the school

Opinion of the Honorable W. Vincent Grady, Dated June 28, 1973

year commencing in September 1973, transportation will be provided only to parochial schools located within the physical confines and geographical limits of the City of White Plains, and will not be provided to parochial schools located outside such physical confines and geographical limits.

It is alleged that prior to the passage of the resolution in question, the defendant Board of Education provided parochial school busing to all children residing within the City of White Plains where such children resided more than 1.5 miles but less than 10 miles from the nearest parochial school of their denomination for grades kindergarten through sixth.

In this action for a declaratory judgment and permanent injunction, the plaintiffs assert that the action by the school board is contrary to §3635 Education Law which authorizes the transportation sought by plaintiffs herein. Subdivision 1 of §3635 governs the transportation of primary and secondary school students and although transportation is required for all school districts outside a city school district, a separate provision is made for a city school district as follows:

> "• • • The foregoing provisions of this subdivision shall not require transportation to be provided for children residing within a city school district, but if provided by such district pursuant to other provisions of this chapter, such transportation shall be offered equally to all such children in like circumstances."

The defendants correctly state that the statute does not impose any obligation upon a city school district to provide transportation for students, however, once transportation is provided, it must "be offered equally to all such children in like circumstances".

Opinion of the Honorable W. Vincent Grady, Dated June 28, 1973

The plaintiffs in support of their application for a preliminary injunction rely on the case of *Matter of Martin v. Brienger,* 49 Misc. 2d 130, aff'd without opinion 26 A. D. 2d 772. The *Martin* case is not in point. There, a non-city school district was mandated to provide transportation pursuant to §3635 (1) Education Law and the issue was not whether transportation was to be offered to parochial school students whose schools were outside the district, but whether there was an available parochial school in the district. Mr. Justice Fanelli held that since the nearest available parochial school of petitioner's denomination was outside the school district boundaries, and was not more than 10 miles from petitioner's home, petitioner's children were entitled to transportation. In the case at bar, all of plaintiffs' children live within the city school district which has no statutory obligation to provide transportation, however, if it elects to provide transportation, only children residing in White Plains and attending schools within the district are "children in like circumstances".

A city school district is treated differently than a non-city school district under §3635 Education Law with respect to transportation and it is this distinction that plaintiffs attack as an invasion of their first amendment rights and a violation of the equal protection clause in that the distinction between city school districts and non-city school districts is arbitrary.

The first sentence of §3635 Education Law points out the rationale behind the transportation mandate for schools in rural districts when it states:

> "Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall

Opinion of the Honorable W. Vincent Grady, Dated June 28, 1973

> be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children."

In view of the fact that city school districts do not have the same transportation problems as in rural areas, they are treated differently and transportation is not mandated in city school districts. All children of school age in the City of White Plains are treated alike so that if transportation is not provided, public transportation facilities are available however, if, as in the instant case, transportation is provided to public and parochial schools, city school children will benefit therefrom. Plaintiffs seek to extend the obligation of the school district beyond the confines of the city school district so that school age children may be transported to parochial schools outside the district. Several of the plaintiffs' children attend the Westchester Day School, which, they allege, is an orthodox Jewish school. Parents have the right to send their children to parochial schools and such right is recognized by §313 Education Law.

It appears that there is no orthodox Jewish school in the City of White Plains, although there are other Catholic parochial schools to which those of plaintiffs' children who are attending St. Anthony's school could attend. Nonetheless, there is no infringement upon plaintiffs' first amendment rights by defendants' action in refusing to provide transportation to parochial schools outside the city school district. Free transportation is available to children who reside in White Plains to public or parochial schools in the City of White Plains.

Opinion of the Honorable W. Vincent Grady, Dated June 28, 1973

There is no showing that the refusal to provide transportation to the White Plains children who attend the Westchester Day School prevents these children from attending such school or from attending another school within the City of White Plains. Plaintiffs' insistence on sending their children to parochial schools outside the City of White Plains does not require the defendants to provide transportation to such schools where the same is not mandated by the Education Law. The classification of city and non-city school district in §3635 of the Education Law does not adversely affect the freedom of religion and such distinction is reasonable.

Accordingly, the motion for preliminary injunction is denied.

Submit order on notice.

Dated: June 28, 1973

W. VINCENT GRADY
Justice Supreme Court

To:

Greenspan & Aurnou, Esqs.
Attorneys for Plaintiffs
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White Plains, New York 10601

Smith, Ranscht, Pollock, Barnes,
Manos & Connors, Esqs.
Attorneys for Defendant Antin
56 Grand Street
White Plains, New York 10601

The Statute Involved, §3635 of the Education Law.

PART III—TRANSPORTATION

§3635. Transportation

1. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school. The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district. Transportation for a lesser distance than two miles in the case of children attending grades kindergarten through eight or three miles in the case of children attending grades nine through twelve and for a greater distance than fifteen miles may be provided by the district, and, if provided, shall be offered equally to all children in like circumstances residing in the district. The foregoing provisions of this subdivision shall not require transportation to be provided

for children residing within a city school district, but if provided by such district pursuant to other provisions of this chapter, such transportation shall be offered equally to all such children in like circumstances. Nothing contained in this subdivision, however, shall be deemed to require a school district (i) to furnish transportation to a child directly to or from his home, or (ii) in the case of a child attending a parochial school of his denomination, to furnish transportation except to or from the nearest available parochial school of such denomination.

[*See main volume for text of 2 to 5*]

As amended L. 1974, c. 755, §1.

Summons, Dated May 23, 1973.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF WESTCHESTER

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Plaintiffs,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Defendants.

Plaintiffs all reside in the City of White Plains, Westchester County.

To the above named Defendants:

You Are Hereby Summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will

be taken against you by default for the relief demanded in the complaint.

Dated: White Plains, New York
May 23, 1973

GREENSPAN & AURNOU
Attorneys for Plaintiffs
Office and Post Office Address
One North Broadway
White Plains, New York 10601
946 2500

Notice: The object of this Action is Declaratory Judgment.

The relief sought is declaratory judgment and injunctive relief.

Complaint, Dated May 23, 1973.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Plaintiffs,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Defendants.

Plaintiffs, complaining of the defendants herein, through their attorneys Greenspan & Aurnou, respectfully show to this court, and allege as follows:

1. Plaintiffs O'Donnell, D'Elia, Barile, Langelius, Bochterle are residents of the City of White Plains, and are parents of children who regularly attend St. Anthony's parochial school (hereinafter referred to as "St. Anthony's plaintiffs").

2. St. Anthony's plaintiffs all reside at least 1.5 miles, but not more than 10 miles from St. Anthony's parochial school.

3. St. Anthony's parochial school is located in the Town of Harrison and, as such, is not within the territorial limits of the White Plains school district.

4. Plaintiffs Yudkowsky, Gozland, Fuchs, Greenspan, Berkowitz, Silverbush, Ehrenkranz and Tanenbaum are

residents of the city of White Plains, and are parents of children who regularly attend the Westchester Day School (hereinafter referred to as "WDS plaintiffs").

5. WDS plaintiffs all reside at least two miles, but not more than 10 miles from Westchester Day School.

6. Westchester Day School is located in the Town of Mamaroneck, and as such is not within the territorial limits of the White Plains School District.

7. Defendant, Arthur A. Antin is Superintendent of Schools in the City of White Plains (hereinafter referred to as "Antin"), and as such participates in and supervises the management of the schools and other educational activities, and performs other functions of as contemplated by and purportedly in accord with the Education Law of the State of New York.

8. Defendant, White Plains Board of Education (hereinafter referred to as "Board") is a Board of Education duly constituted and existing pursuant to and defined by the Education Law of the State of New York, and as such is the governing body in control of education, educational activities, and other activities ancillary thereto within the school district of the City of White Plains, as such school district is constituted and defined by the Education Law of the State of New York, and as such acts purportedly in accord with the Education Law of the State of New York.

9. For a long time prior hereto the defendant Board has provided transportation to all children residing within the City of White Plains, who attend non-public schools, so long as such schools were located at least 1.5 miles, but no more than 10 miles from such residence, without regard to whether such schools were located within the territorial limits of the City of White Plains, or outside thereof.

10. Plaintiffs herein have applied for and received such transportation for their children in the past, and are continuing to receive the same until the end of the current school year.

11. Upon information and belief, on or about the 14th day of May, 1973, at the request of the defendant Antin, the defendant Board passed a resolution which, in substance, will limit transportation during the school year, commencing September, 1973, for non-public school students residing within the City of White Plains to non-public schools, provided such non-public schools are located within the territorial limits of White Plains, and will no longer furnish transportation to any non-public schools located outside the City of White Plains, even though such non-public school is at least 1.5 miles, and not more than 10 miles from the residence of the parent requesting transportation for his child.

12. Transportation, as aforesaid, has been provided by the defendant Board for all children from kindergarten through the sixth grade.

13. Upon information and belief plaintiffs herein have requested in writing of the defendant Board, upon forms provided by the defendant Board, for transportation to be provided their children to their respective schools, all as authorized by Sec. 3635(2) of the Education Law of the State of New York, for the school year commencing September, 1973.

14. Upon information and belief Sec. 3635 of the Education Law of the State of New York, Subdivision (1) thereof, requires that if a city school system elects to furnish transportation it must be offered equally to all children in like circumstances, pursuant to the provisions of the statute.

15. Upon information and belief, the aforesaid statute makes it mandatory upon school districts located outside of the territorial limits of the city to provide transportation to all non-public school students regularly attending grades kindergarten through eighth, who live more than 2 miles and up to a distance of 10 miles from the parochial school they legally attend. Furthermore, such transportation must be afforded to all students legally attending a parochial school in grades 9 through 12, where they reside more than 3, but less than 10 miles from such parochial school.

16. Upon information and belief the defendants herein have failed and refused to provide the above described transportation required by the statute, but instead have in the past provided less than the foregoing, all as hereinabove described, and by virtue of the aforementioned resolution, will further limit such transportation commencing in September of 1973.

17. Children of all plaintiffs herein attend, not only grades kindergarten through 8, but some also attend grades 9 through 12 in other parochial schools.

18. Upon information and belief insofar as section 3635 of the Education Law discriminates between residents of school districts within a city and residents of school districts outside the city in that it purportedly mandates transportation for parochial school students resident in school districts outside the city, while purportedly merely permitting transportation for parochial school students resident in a school district within a city, the same deprives residents of a school district within a city of equal protection of the law, and as such, is illegal and unconstitutional, and in addition thereto, such procedure violates plaintiffs' rights to freedom of religion.

19. Upon information and belief, St. Anthony's plaintiffs are entitled to transportation for their children to St. Anthony's parochial school, and WDS plaintiffs are entitled to transportation for their children to the Westchester Day School.

20. Upon information and belief, so long as the City of White Plains offers to provide any non-public school transportation, it must provide non-public school and parochial school transportation in accord with the statutory scheme set forth in Section 3635 of the Education Law of the State of New York.

21. The acts and conduct of the defendants herein, unless enjoined by this court, shall actually deprive plaintiffs herein of their right to transportation, and will cause plaintiffs and their children irreparable harm for which they have no adequate remedy at law.

A. The cost of private individual transportation is economically prohibitive.

B. Both St. Anthony's parochial school and Westchester Day School give the religious instruction in the faith professed by the respective plaintiffs.

C. Transportation is needed by children of the plaintiffs herein because of the remoteness of the schools to which they attend, and for the promotion of the best interest of such children, so that a quick and efficacious resolution of the issues is urgent.

D. An action at law by plaintiffs for the recovery of transportation costs would be burdensome, expensive, and incapable of quickly resolving the issues, and determining the rights and liabilities of the parties.

22. The acts and conduct of the defendants herein have cast a doubt over the right of plaintiffs herein to obtain transportation so that declaratory judgment and injunction are proper remedies to determine the rights and liabilities of the parties herein, including the judicial interpretation of the constitutionality of the applicable statute, its interpretation, operation and enforcement.

23. Upon information and belief the issues to be determined herein are of a paramount public importance since the decision of this court will affect the rights and liabilities of untold hundreds of other families similarly situated both in the City of White Plains and elsewhere.

WHEREFORE, plaintiffs herein demand judgment against the defendants herein as follows:

A) That the court declare the rights and other legal relations as to and between the plaintiffs and defendants herein with regard to the busing of plaintiffs' children to parochial schools located outside the territorial limits of the City of White Plains;

B) That in so doing the court declare that defendants have no right to discontinue the busing of plaintiffs' children, and that plaintiffs' children are entitled to transportation to and from the parochial school of their choice, provided it is the nearest parochial school of their denomination, and:

C) 1) in the case of children from kindergarten through 6th grade that the distance be more than 1.5 miles and less than 10 miles;

2) in the case of children in grades 7 and 8, that the distance be at least 2 miles, but no more than 10 miles;

3) in the case of children in grades 9 through 12, that the distance be at least 3 miles, but no more than 10 miles; and

without regard to the location of such schools, inside or outside the territorial limits of the City of White Plains.

Complaint, Dated May 23, 1973

D) That this court issue such mandatory and prohibitory injunctions, orders and decrees as to carry out the aforesaid declarations permanently and during the pendency of this action.

E) That this court declare judgment that in construction, operation or effect Section 3635 of the Education Law insofar as it discriminates between those residing in city school districts and those residing in school districts outside city limits be deemed void, unconstitutional and ineffective, and any resolutions passed by the defendant Board in purported compliance, or under purported authorization thereof be declared void, unconstitutional and ineffective.

F) That this court declare judgment granting unto plaintiffs herein all of the rights to transportation for their children to and from their respective parochial schools enjoyed by residents of school districts located outside the city of White Plains, as described in Section 3635 of the Education Law of the State of New York and authorized pursuant to Article XI, Sec. 3 of the Constitution of the State of New York.

G) That this court grant unto plaintiffs such other further and different relief as may seem just and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
May 23, 1973

GREENSPAN & AURNOU
Attorneys for Plaintiffs
Office and Post Office Address
One North Broadway
White Plains, New York 10601
946 2500

Answer, Dated July 17, 1973.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANENBAUM,

Plaintiffs,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Defendants.

The Defendants by their attorneys, Smith, Ranscht, Pollock, Barnes, Manos & Connors, for their answer to the Plaintiffs' Complaint herein alleges:

1. Denies each and every allegation contained in Paragraph "13" of the Complaint herein except admits that Plaintiffs, Yudowsky, Gozland, Fuchs and Greenspan requested in writing of the Defendant that transportation be provided for their children for the school year commencing September, 1973.

2. Denies knowledge or information sufficient to form a belief as to Plaintiffs' children attending school beyond the sixth grade as alleged in Paragraph "17" of the Complaint.

3. Denies each and every allegation contained in Paragraphs "16", "18", "19", "20", "21", "22" and "23" of the Complaint herein.

Answer, Dated July 17, 1973

WHEREFORE, the Defendants demand judgment that the Complaint against them be dismissed together with the costs and disbursements of this action.

Dated: White Plains, New York
July 17, 1973.

SMITH, RANSCHT, POLLOCK, BARNES,
MANOS & CONNORS
Attorneys for Defendants
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56 Grand Street
White Plains, New York 10601

Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-372

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANNENBAUM,

Appellants,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, INTERVENOR *PRO SE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-372

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANNENBAUM,

Appellants,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, INTERVENOR *PRO SE*

The Attorney General of the State of New York, Intervenor *pro se*, moves, pursuant to this Court's Rule 16, for dismissal of this appeal for want of a substantial Federal or constitutional question, or that the judgment of the New York Court of Appeals be affirmed.

The Attorney General was requested by Hon. John C. Marbach, Justice of the Supreme Court of the State of

New York, to submit a Memorandum of Law in the action (Jurisdictional Statement, p. 5a). The Attorney General did so. The Court of Appeals of the State of New York by order made September 12, 1974, granted the Attorney General formal leave to intervene in his statutory capacity under New York's Executive Law, Section 71, to uphold the constitutionality of the state statute here attacked.

Opinions Below

The decision of the New York Court of Appeals is not yet reported. It is reproduced at page 1a of the Jurisdictional Statement.

The judgment and opinion of Justice Marbach is reported at 81 Misc 2d 849 but not yet otherwise reported. It is reproduced at pp. 2a-11a of the Jurisdictional Statement.

There were earlier opinions of the Appellate Division and of Justice W. Vincent Grady on the plaintiffs' application for a preliminary injunction which are reproduced at pp. 12a-17a of the Jurisdictional Statement. The Appellate Division decision is reported at 43 A D 2d 699, 350 NYS 2d 611 (2nd Dept., 1973). The opinion of Justice Grady is not otherwise reported.

Statute Involved

Section 3635 of the Education Law of the State of New York is the statute involved. It is reproduced at pp. 18a-19a of the Jurisdictional Statement.

Question Presented

Non-city school districts are mandated by Section 3635 to provide transportation to all school children. City school districts are not required to offer transportation at all, but if they do elect to offer transportation, they are required to

offer it equally to all children in like circumstances.* Is this a denial of equal protection of the laws to children of residents of a city school district which does not provide transportation to children to any school *outside* the school district?

In the State Courts, the appellants had urged that the refusal of the School Board of White Plains to transport their children to parochial schools outside the White Plains City School District also infringed on their First Amendment freedom to exercise their religion. The Jurisdictional Statement makes no such claim but is confined solely to the question stated above.

Preliminary Statement

As we have noted, the appellants are not claiming here that the refusal of the White Plains City School Board to transport their children to parochial schools outside the White Plains District is an infringement of their religious freedom. The gravamen of their appeal is that there is a constitutional duty to provide transportation to schools outside the school district. School children attending public or parochial schools in the District are not affected since all such schools are within the White Plains City School District. Free transportation is available to children residing in White Plains to the public or parochial schools within White Plains. Jurisdictional Statement p. 16a.

While the State (and by delegation) its school districts may provide for bus transportation to school children whether attending public or private schools, *Everson* v.

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* This last phrase has been held by the State Education Department and the State Courts, as meaning that children living in and attending schools, public or parochial, within the city school district, are in "like circumstances". Jurisdictional Statement, pp. 7a-8a.

Board of Education, 330 U.S. 1 (1947), it is not bound to use its finite resources to provide such transportation to parochial school children attending such schools outside the school district. See *Norwood* v. *Harrison,* 413 U.S. 455, 471 (1973).

The action of the White Plains School Board in the present case was motivated by budgetary considerations. Jurisdictional Statement, p. 5a. The saving in refusing to transport the few students involved to parochial schools outside the School District was, in 1973, $50,000. Jurisdictional Statement, p. 5.

Appellants now seek to establish an Equal Protection claim of substance in the distinction made by the State's education law (Section 3635) which, as regards transportation, mandates that transportation be provided by non-city school districts but leave it optional with *city* school districts as to whether or not to provide transportation. The claim is singularly without merit since here White Plains has elected to provide such transportation to all children to *any* school in its city.

ARGUMENT

The distinction between non-city and city school districts as to their obligation to provide transportation under Education Law, Section 3635, is based on a reasonable and legitimate classification of school districts. It is not therefore a denial of the equal protection of the laws.

(1)

If a statutory scheme or classification has a reasonable basis and a legitimate objective, it is not a denial of equal protection. In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973), reh. den. 411 U.S. 959, this Court upheld the Texas system of financing public schools; it held there was a rational basis for it although it was shown that the

result was wide-spread disparity in the *per capita* expenditure per pupil arising from the differences in the taxable wealth of the many Texas school districts.

If a classification has a reasonable basis it does not offend the Constitution because it is not made with mathematical nicety or because in practice it results in some inequity. *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970), restating the language used in *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911). See *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1973).

The classes of school districts set up by the Legislature clearly reflect population densities in the various areas of the state. Not only are there differences between the organization and method of operation between non-city school districts (common, union free, central, etc.) and city school districts, but the latter classification is broken down into (1) city school districts of cities with 125,000 population or less (Article 51 of the Education Law) and (2) city school districts of the more populous cities; New York, Buffalo, Rochester, Syracuse, Yonkers and Albany (Art. 52). A special Article deals with the New York City School System, Article 52-A.

The number of members of the boards of education, the method of their election or appointment, the responsibilities of the chief administrator, such as district superintendents, superintendents of schools, the Chancellor of the New York City School system, etc., differ from each type of district to the other.

The fiscal relations between the political subdivisions of the state, the counties, cities, towns and villages, differ widely, reflecting again, the demographic facts.

The Legislature in dealing with a county like Essex County with an area of 1826 square miles or Franklin County with an area of 1685 square miles and total populations of less than 50,000 persons in each county is dealing

with an entirely different situation as regards the transportation of pupils than in dealing with Westchester County with an area of 435 square miles and a total population of about 900,000. That it should make different provisions for the thinly populated school districts of Essex or Franklin Counties than it makes for those in Westchester, is reasonable and justifiable.

State differentiation between its areas based on population density is a legitimate classification. *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The state could even adopt a set of laws (the civil laws) for New York City and a different set of laws (the common laws) for the rest of the State without infringing on equal protection. *Missouri* v. *Lewis,* 101 U.S. 22, 31 (1879).

The creation of judicial districts which, it was claimed, resulted in malapportionment of judges and excessive delays to certain litigants was not a denial of equal protection. It was so held by a three-judge federal court in *Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y., 1967). Territorial uniformity is not mandated by the Constitution. "There is no rule that counties, as counties, must be treated alike", a quotation from *Griffin* v. *County School Board,* 377 U.S. 218, 230 (1963), might be paraphrased in view of *San Antonio School District* v. *Rodriguez, supra,* as "There is no rule that school districts as school districts must be treated alike".•

Density and concentration of population leads to a demand for mass transportation within cities and to their sur-

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• In *Cartwright* v. *Sharpe,* 40 Wis. 2d 494, 162 N.W. 2d 5 (1966), the Supreme Court of Wisconsin had before it a statute which also distinguished between students residing in cities and those who did not, as regards the right to transportation. 162 N.W. 2d at p. 11. The Court upheld the distinction. While the Wisconsin statute is different in several ways from Section 3635 of the Education Law, the basic point, that the legislative classification is a reasonable one, was upheld.

rounding areas. The greater the population, the more extensive such local transportation system is likely to be. New York City has an enormous intra-city system.

While the smaller cities do not have so large a system, they do have local bus lines; rural communities are dependent for the most part on inter-city or inter-state bus lines which stop only at designated points in the area, if at all. The City of White Plains which according to the 1970 census had a population of 50,220 is served by local buses within the city and to several of the surrounding areas.

But the legislative determination that city school districts need not provide any transportation for school children at all, does not rest on the absence or presence of mass-transportation facilities, adequate or inadequate. The presence of such facilities may have been one factor. Other factors may have been the fact that city school districts are more compact—schools are nearer the children's homes—that "car pooling" by parents is easier to achieve and that city school districts tend to locate schools in residential areas, whereas non-city school districts tend to locate schools centrally in areas of convenient highway access. Cities usually have sidewalks, an abundance of traffic lights and police forces to cope with traffic.

(2)

Appellants urge that the distinction between city and non-city school districts is arbitrary and capricious because: (a) Certain city school districts embrace territory not within the city's own geographical limits and (b) Certain *non-city* school districts include territory within the territorial limits of cities. Jurisdictional Statement pp. 7-8.

The definition of a "city school district" is contained in Article 1, Section 2(16) (a) of the State's Education Law. It reads as follows:

"16. City school district. a. The following school districts are hereby designated and declared to be city school dis-

tricts: (1) Any school district coterminous with a city on January first, nineteen hundred fifty; (2) any school district part of which was without and part of which was within a city on January first, nineteen hundred fifty, and which then contained the whole or the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census; and (3) any school district wholly within, but not coterminous with, a city on January first, nineteen hundred fifty, and which then contained the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census.

b. Whenever a city shall be created after January first, nineteen hundred fifty, that school district shall be and become a city school district which, on the effective date of the incorporation of such city, is: (1) coterminous with the city; (2) partly without and partly within the city and then contains the whole or the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census; or (3) wholly within but not coterminous with the city and then contains the greater portion of the children of the city between birth and eighteen years of age, as shown by the school census.

c. The corporate existence of any school district, which, by virtue of the provisions of this subdivision, shall be and become a city school district, shall continue, and any such school district thereafter shall be governed by the provisions of this chapter applicable to city school districts."

The essential component of a "city school district" in all three subdivisions of Section 2 (16)(a) is a *"city"*.

As of the Fall of 1974, there was a total of 62 city school districts in New York State out of a total of 738 operating school districts. Survey of Enrollment, Staff and School Housing, Fall 1974, State Education Department, p. 3.

There are 19 city school districts entirely within the respective cities' boundaries or in a few cases which are smaller than the city itself. These include the largest cities, New York, Buffalo, Syracuse, Rochester, Yonkers and Albany, and such cities as Utica, Rye, White Plains, Mt. Vernon, Glen Cove, Poughkeepsie and New Rochelle. Bureau of School District Organization, September 1974, City School Districts, Legal and Territorial Organization.

There are two city school districts which *ab initio* extended beyond the boundaries of the cities in which they are located and took in territory adjoining the cities, namely, Glens Falls and Niagara Falls (*Ibid.*).

There are 34 "Enlarged School Districts" (*Ibid.*). These are city school districts which the Commissioner of Education, under statutory authority granted him to consolidate school districts in cities of less than 125,000 population with such adjoining area or areas as, in his judgment, were suitable for consolidation, directed to be enlarged. Education Law, Sec. 1526.

The need for such enlargement arose from the general movement of central city populations into adjoining areas; the enlarged city school district served the consolidated areas better than either separate entity could. Economies could be effected; better facilities provided. Thus the Elmira City School District in Chemung County includes such contiguous areas as Pine City and Wellsbury; the Hudson City School District, the Newburgh City School District, and the Saratoga Springs City School District, include the contiguous suburban areas listed on page 8 of the Jurisdictional Statement. Such enlarged school districts are required to furnish transportation to children residing outside the city limits to the school they attend within the city school district—again a recognition that where population density is low, transportation is necessary. Education Law, Section 2503(12).

In a State with a long history, it is not surprising that over the years some small communities, seven in number, received city charters. These accidents of political history created a city such as the City of Sherrill, population in 1970, 2986. However the *school* population of Sherrill in 1974 was *3640* since the City School District of Sherrill embraces territory well beyond the small city limits.

All of the foregoing, even considering the anomaly of the City of Sherrill and other minor oddities in the State's school districts, do not detract from the fundamental fact; the Legislature in enacting Section 3635 was dealing in general with metropolitan and city areas and differentiating them from rural, non-city, areas in respect to the providing of transportation. The Legislature did not forbid the city school districts from furnishing transportation, but it did not require them to do so except as required under Section 2503(12) in the case of "Enlarged City School Districts". If a city school district embraced a relatively large area outside the core city, it was free to provide transportation but it was not mandated to do so. The Legislature of New York considered that the population density connoted by "City" in the designation of a school district's title justified the reasonable assumption that the area was one of population density. As respects the 62 City School Districts, the assumption, despite anomalies due to the accidents of political history, is justified. The fact that a classification is not made with mathematical nicety or results in some inequity does not offend the Constitution, if it is otherwise based on reason. *Dandridge* v. *Williams, supra; Lindley* v. *Natural Carbonic Gas Co., supra; McGinnis* v. *Royster, supra.* Lines drawn by a legislature frequently leave some matter out that might well have been included, but this is a legislative decision. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 39 L. Ed. 2d 797; 94 S. Ct. 1536 (1974). In matters relating to population concentrations, a state government may prescribe substantive restrictions or provisions for one part

of the state and not for others. *Salsburg* v. *Maryland,* 346 U.S. 545 (1954). The division of the State into welfare districts by the Legislature resulting in an unequal distribution of public assistance costs as between the districts was upheld as a legitimate division, despite any inequality. *Lindsay* v. *Wyman,* 372 F. Supp. 1360 (S.D.N.Y. 1974), affd. *sub nom. Beame* v. *Lavine,* —— U.S. ——, 95 S. Ct. 21 (1974).

The reference to the population of towns and villages, both incorporated and unincorporated, at page 9 of the Jurisdictional Statement, is not a relevant one. The principal *political* subdivision of the State is the county—there are 62 in the State. The principal *political* subdivisions of the county are the cities and "towns". Within a town, there may be several incorporated villages; parts of the rest of the town are sometimes referred to as unincorporated villages. School districts are separate *educational* entities not related to the political entities such as the counties, towns or villages. That some towns or villages may have greater populations than some cities, is not relevant. It is not population that is determinative, it is population *density.*

(3)

Manifest factual error in a Jurisdictional Statement to this Court, even if such error is unimportant, should not go uncorrected. It is not true as alleged on page 7 of the Jurisdictional Statement that the City School Districts of White Plains, New Rochelle, Yonkers and Mt. Vernon overlap into surrounding areas. Our statement is based on an examination of the maps of the respective city school districts. These school districts are co-terminus with their respective city boundaries.

(4)

A statute which permits a City School District's Board of Education to decide whether, or how much, transporta-

tion should be provided to its students in the light of its budget, the availability of public transportation, the location of its schools and of the residences of its school population, is a reasonable one. The difference in the statute between city school districts and non-city school districts is based on differences in the nature of the two types of school districts and is a reasonable one. The distinction drawn by the statute bears a reasonable relation to a legitimate state end. *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969).

CONCLUSION

The judgment below should be affirmed, or, in the alternative, the appeal be dismissed.

Dated: New York, New York, September 29, 1975.

Respectfully submitted,

Louis J. Lefkowitz
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Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75—372.

BRIAN O'DONNELL, KALMON YUDKOWSKY, RONALD D'ELIA, ROLAND GOZLAND, PATSY BARILE, JOSEPH FUCHS, ROBERT LANGELIUS, LEON J. GREENSPAN, CARL BOCHTERLE, EZRA BERKOWITZ, JEFFREY SILVERBUSH, LOUIS EHRENKRANZ, MARTIN TANNENBAUM,

Appellants,

against

ARTHUR A. ANTIN and WHITE PLAINS BOARD OF EDUCATION,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Appellants Reply to Motion to Dismiss or Affirm by Louis J. Lefkowitz, Attorney General of the State of New York, Intervenor *Pro Se*.

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In The

Supreme Court of the United States

October Term, 1975.

No. 75-372.

Brian O'Donnell, Kalmon Yudkowsky, Ronald D'Elia, Roland Gozland, Patsy Barile, Joseph Fuchs, Robert Langelius, Leon J. Greenspan, Carl Bochterle, Ezra Berkowitz, Jeffrey Silverbush, Louis Ehrenkranz, Martin Tannenbaum,

Appellants,

against

Arthur A. Antin and White Plains Board of Education,

Appellees.

On Appeal from the Court of Appeals of the State of New York.

Appellants' Reply to Motion to Dismiss or Affirm by Louis J. Lefkowitz, Attorney General of the State of New York, Intervenor *Pro Se.*

The Attorney General of the State of New York, Intervenor *pro se,* has moved, pursuant to this Court's Rule 16, for the dismissal of this appeal for want of a substantial Federal or constitutional question, or that the judgment of the New York Court of Appeals be affirmed.

Appellants, pursuant to this Court's Rule 16(4) submits this brief in opposition to the aforesaid motion of the Attorney General of the State of New York.

ARGUMENT.

The distinction between non-city and city school districts as to their obligations to provide transportation under Education Law, §3635, is based on an unreasonable and irrational classification of school districts. It is therefore a denial of equal protection of the laws.

(I)

The Intervenor at §(1), page 4 of its brief, sets forth the proposition "If a statutory scheme or classification has a reasonable basis and a legitimate objective, it is not a denial of equal protection." Citing *San Antonio School District v. Rodriguez,* 411 U. S. 1 (1973) Reh. Den. 411 U. S. 959, as authority. Intervenor further states on page 5:

> "If a classification has a reasonable basis, it does not offend the constitution because it is not made with mathematical nicety or because in practice it results in some inequity."

Citing *Dandridge v. Williams,* 397 U. S. 471, 485 (1970). Appellants are in complete agreement with Intervenor as to the applicable rules.

San Antonio School District v. Rodriguez, Supra, and *Dandridge v. Williams, Supra,* involve the equal protection clause as to its limittaions, answering negatively whether or not strict scrutiny would apply so as to require a state to justify its particular law by showing a compelling state interest. Appellants herein appeal to this Court to look upon §3635 of the Education Law in the light of the circumstances and facts presented which evidence a clear showing of irrational, unreasonable and arbitrary basis upon which the classification in question is founded.

(II)

Intervenor next argues that the school districts set up by the state legislature "clearly reflect population densities of the various areas of the state."

In support of this argument, Intervenor cites:

> "State differentiation between its areas based on population density is a legitimate classification." *McGowan v. Maryland,* 366 U. S. 420 (1961).

It is appellants' position that the reasoning of the United States District Court of Rhode Island in the case of *Women's Liberation Union of Rhode Island, Inc. v. Israel,* 359 F. Supp. 44 (1974), aff'd 512 F. 2d (1st Cir. 1975) is more apt. The Court, at page 49 of 379 F. Supp. stated:

> "A review of recent Supreme Court decisions indicates that the highly differential 'rational basis' test applied by the court in the 1960's is being reshaped into a meaningful standard of review."

The Court then went on to discuss three specific areas of reform now taking place in this field. Finally, as to its third point, the Court stated at page 49 of 379 F. Supp.:

> "The Court in a number of instances, has abandoned the highly differential formulation of the 'rational basis' test, such has been expressed in *McGowan v. Maryland,* 366 U. S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961), that a classification must be sustained 'if any state of facts reasonably may be conceived to justify it' and now demands that the classification bears substantial or significant relation to the objective it is claimed to further."

The current trend is to get away from the type of test which was used in *McGowan v. Maryland, Supra.* The Courts take a closer and more meaningful look at classification legislation. Intervenor, in its brief, is requesting this Court to following the example set down in *McGowan* and use a method of testing which is antiquated and rapidly giving way to a new and more meaningful standard of review.

(III)

Intervenor next, to convince this Court that in areas with greater population, there exists more extensive local transportation systems. Intervenor, however, fails to respond to the assertions made in the appellants' main brief that in the City of White Plains busing schedules are not correlated with the school schedules; nor does Intervenor discuss the logical offshoot of increased population, namely, increased traffic congestion. This increases the degree of danger to pedestrian school children despite the presence of traffic lights and other forms of traffic control devices. Intervenor also fails to present any proof contrary to the fact that there are many sections of smaller cities such as White Plains which contain no sidewalks, and are quite rural and residential. In addition, the brief of Intervenor ignores the fact that there are many sections of populated urban municipalities which are unsafe to walk through due to the crime situation in those areas, and that they are usually located in cities!

(IV)

Intervenor next argues that the distinction between city and non-city school districts is reasonable and relies on Article 1, Section 2(16) (a) of the State Education Law

cited on page 8 of its brief. The evidence is quite clear that by definition a city school district within the State of New York can and does overreach the municipal boundaries of the city. The statutory definition of the term "city school district" supports exactly the position presented by the appellants in their main brief before this Court.

While the essential component of a city school district is a city, the fact still remains that the statutory definition allows a city school district to overlap into the surrounding communities and, therefore, encompass certain portions of communities which, but for the fact that they had been encompassed within the city school district, would be afforded the opportunity to receive the benefits of mandatory transportation as dictated by the Education Law.

Further support for appellants' argument appears in the statistics set out by Intervenor drawn from the survey of enrollment, Staff and School Housing, Fall 1974, State Education Department, Page 3 of the 62 city school districts entirely within respective city boundaries. Intervenor concedes, as submitted by appellants, that the overlap of city school districts into the surrounding areas is quite prevalent in the State of New York.

On page 9 of its brief Intervenor points to the so-called enlarged school districts in support of its proposition that the statutory scheme is reasonable, stating on page 7:

> "Such enlarged school districts are required to furnish transportation to children residing outside the city limits to the school they attend within the city school district."

Such a classification provides transportation for children living outside geographical city limits. However, in a city school district—not so designated—the same child—not in the city—would get no transportation. No criteria are set forth from which we can rationally determine whether or not a city school district should be designated an enlarged city school district. Thus—not all city school districts with less than 175,000 population encompassing surrounding areas are so treated. Nowhere is transportation mentioned as one of the criteria for such a designation Education Law §1526. Only in §2503(12) do we find the cryptic distinction requiring transportation for non-city residents (though resident in the enlarged city school district). We thus have a distinction here based upon non-city residence as opposed to city residence. How do we square up this distinction with distinction with the non-city resident of the city school district not designated as an enlarged city school district? One gets transportation —the other does not! The rhyme, reason or rationality of such a scheme escapes counsel for appellants. Intervenor's assertion that the statutory scheme is rational does not make it so!

(V)

Intervenor in Section (3) at page 11 of its brief, claims manifest factual error in appellants' jurisdictional statement to this Court. Appellants assert that the statements set forth in their brief are accurate. This is proven by an examination of the attached information in Appendix A which consists of a map of the County of Westchester and a legend which is used to define the boundary lines of the various school districts in Westchester County published and produced by the County of Westchester—The Westchester County Association, Inc. Joint Information Study Program. The solid lines on this map indicate school district boundary lines which do not coin-

cide with municipal boundaries and that the dotted boundary lines represent school district boundary lines which do coincide with municipal boundaries. A quick review of this map will show that the school districts of the cities of Yonkers, Mt. Vernon, New Rochelle and White Plains all overlap. Intervenor concedes that the City School District of Rye does in effect overlap into the surrounding Town of Harrison and Village of Port Chester.

This matter is now placed before the Court as to which of the two sources relied upon by Intervenor and the appellants herein is correct in its determination of school district boundary lines. It should further be noted that the boundary lines which are drawn up on the attached map and any notations on that map were made by the County of Westchester. No markings or comments have been placed upon that map by the appellants.

(VI)

Intervenor finally states in Section (4) located at pages 11 and 12 of its brief that:

> "A statute which permits a city school district's board of education to decide whether, or how much, transportation should be provided to its students in the light of its budget, availability of public transportation, location of its schools and of the residences of the school population, is a reasonable one."

If such a right was also granted to non-city school districts and enlarged city school districts there would be no lawsuit. No rational basis for the granting or withholding of transportation within the statutory scheme of classification has been shown. The statute is unconstitutional.

Conclusion.

This appeal should be granted and the judgment below of the Court of Appeals of the State of New York should be reversed.

Dated: White Plains, New York,
October 6, 1975.

Respectfully submitted,

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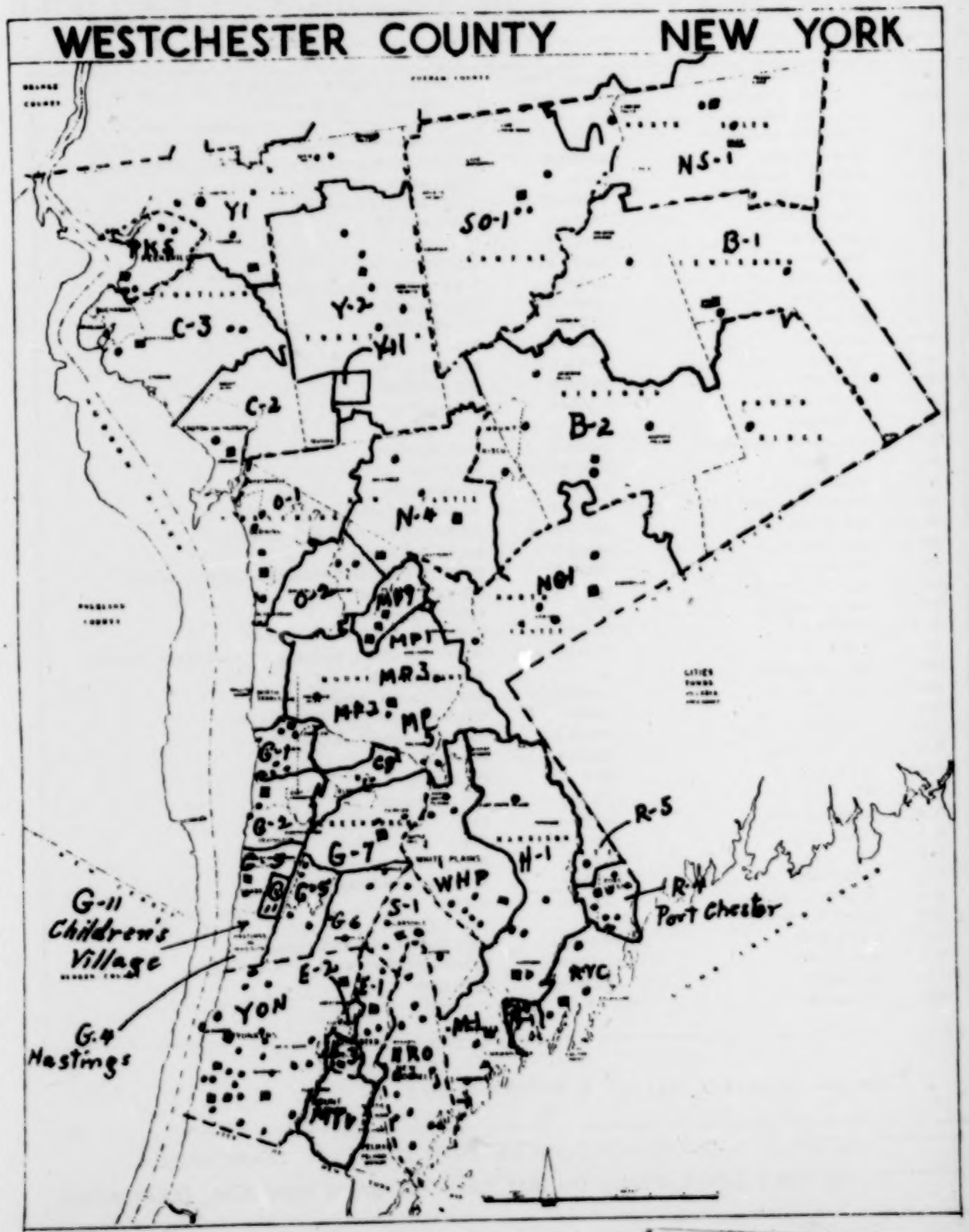

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SCHOOL DISTRICT IDENTIFICATION

MAP SYMBOL	COMMONLY USED NAME	DISTRICT TYPE AND NUMBER	CITIES & TOWNS INCLUDED (IN WHOLE OR IN PART)
B-1	KATONAH-LEWISBORO	UNION 1	BEDFORD, LEWISBORO, NORTH SALEM, POUND RIDGE
B-2	MOUNT KISCO	CENTRAL 2	BEDFORD, NEW CASTLE, POUND RIDGE, NORTH CASTLE
C-2	CROTON-HARMON	UNION 2	CORTLANDT, YORKTOWN
C-3	CORTLANDT CENTRAL	CENTRAL 3	CORTLANDT, PEEKSKILL
E-1	EASTCHESTER	UNION 1	EASTCHESTER
E-2	TUCKAHOE	UNION 2	EASTCHESTER
E-3	BRONXVILLE	UNION 3	EASTCHESTER
G-1	TARRYTOWN	UNION 1	GREENBURGH, MOUNT PLEASANT
G-2	IRVINGTON	UNION 2	GREENBURGH
G-3	DOBBS FERRY	UNION 3	GREENBURGH
G-4	HASTINGS	UNION 4	GREENBURGH
G-5	ARDSLEY	UNION 5	GREENBURGH
G-6	EDGEMONT	UNION 6	GREENBURGH
G-7	GREENBURGH	CENTRAL 7	GREENBURGH
G-9	ELMSFORD	UNION 9	GREENBURGH
G-11	CHILDREN'S VILLAGE	UNION 11	GREENBURGH
H-1	HARRISON	CENTRAL 1	HARRISON
M-1	MAMARONECK	UNION 1	MAMARONECK
MP-1	MOUNT PLEASANT	CENTRAL 1	MOUNT PLEASANT, NORTH CASTLE
MP-2	POCANTICO HILLS	CENTRAL 2	MOUNT PLEASANT, GREENBURGH
MP-3	HAWTHORNE KNOLLS	UNION 3	MOUNT PLEASANT
MP-5	VALHALLA	UNION 5	MOUNT PLEASANT, GREENBURGH, NORTH CASTLE
MP-9	PLEASANTVILLE	UNION 9	MOUNT PLEASANT
MTV	MOUNT VERNON	CITY	MOUNT VERNON
N-4	CHAPPAQUA	CENTRAL 4	NEW CASTLE, MOUNT PLEASANT
NC-1	BYRAM HILLS	CENTRAL 1	MOUNT PLEASANT, NO CASTLE, NEW CASTLE, BEDFORD
NRO	NEW ROCHELLE	CITY	NEW ROCHELLE
NS-1[B]	NORTH SALEM	CENTRAL 1	NORTH SALEM, SOMERS
O-1	OSSINING	UNION 1	OSSINING, NEW CASTLE, YORKTOWN
O-2	BRIARCLIFF MANOR	UNION 2	OSSINING, MOUNT PLEASANT
P-1	THE PELHAMS	UNION 1	PELHAM
PKS	PEEKSKILL	CITY 1	PEEKSKILL
R-1	RYE NECK	UNION 1	RYE, RYE CITY
R-4	PORT CHESTER	UNION 4	RYE
R-5	RIDGE STREET	UNION 5	RYE
RYC	RYE CITY	CITY	RYE CITY
S-1	SCARSDALE	UNION 1	SCARSDALE, MAMARONECK
SO-1	SOMERS CENTRAL	CENTRAL 1	SOMERS
WHP	WHITE PLAINS	CITY	WHITE PLAINS
Y-1[B]	LAKELAND	CENTRAL 1	YORKTOWN, CORTLANDT, SOMERS
Y-2	YORKTOWN	CENTRAL 2	YORKTOWN, CORTLANDT, NEW CASTLE
Y-11	WILTWYCK	UNION 11	YORKTOWN
YON	YONKERS	CITY	YONKERS

[B] PORTION OF SCHOOL DISTRICT IN PUTNAM COUNTY

---- DISTRICT LINES WHICH COINCIDE WITH MUNICIPAL BOUNDARIES

——— DISTRICT LINES WHICH DO NOT COINCIDE WITH MUNICIPAL BOUNDARIES

○ ELEMENTARY SCHOOL ▯ HIGH SCHOOL